

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DEC 22 2000

PATRICK FISHER
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

JEREMIAH FRIDAY,

Defendant-Appellee.

No. 00-8095
(D.C. No. 00-CR-137-J)
(District of Wyoming)

ORDER AND JUDGMENT*

Before **EBEL**, **MURPHY**, and **LUCERO**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

The United States appeals from the district court's order granting defendant release on unsecured bond for the period December 22, 2000 at 2:00 p.m. and ending on December 28, 2000 at 12:00 p.m. We reverse and remand.

On November 21, 2000, defendant entered guilty pleas to three counts of a pending indictment alleging in Count One, assault resulting in serious bodily injury in violation of 18 U.S.C. §§ 113(a)(6); Count Two, assault resulting in serious bodily injury in violation of 18 U.S.C. §§ 113(a)(6), 1153; and Count Three, assault with dangerous weapon with intent to do bodily harm in violation of 18 U.S.C. §§ 113(a)(3), 1153, and 2. Defendant is currently awaiting sentencing on these counts.

On December 20, 2000, defendant filed a motion seeking release during the holiday season. The district court granted the motion and ordered that defendant be released on an unsecured bond in the sum of \$10,000 for the period commencing December 22, 2000 at 2:00 p.m. and ending on December 28, 2000 at noon. The United States filed a notice of appeal from this order and a motion for stay pending appeal.

The United States argues that the district court did not find, nor could it find, that defendant met the conditions for release pending sentencing specified in 18 U.S.C. § 3143(a)(2). Defendant does not contest the fact that he has been found guilty of a "crime of violence" within the meaning of 18 U.S.C.

§ 3142(f)(1)(A). This being the case, the district court could order his release only if it determined that “there is a substantial likelihood that a motion for acquittal or new trial will be granted,” id. § 3143(a)(2)(A)(i), or if “an attorney for the Government has recommended that no sentence of imprisonment be imposed on the person,” id. § 1343(a)(2)(A)(ii).¹ The district court made no such finding here, and its order granting release was therefore unauthorized by statute.

Defendant has filed a response to the United States’ motion for stay in which he urges us to affirm on an alternative basis: that he is entitled to release pursuant to 28 U.S.C. § 3145 upon a showing of exceptional reasons why his detention would not be appropriate. Defendant is free to make this argument, which requires a finding by the district court, to the district court on remand; we will not entertain it in the first instance here.

The judgment of the United States District Court for the District of Wyoming is REVERSED and REMANDED for further proceedings in

¹ The district court also would have to find by clear and convincing evidence that defendant was not likely to flee or to pose a danger to the community; however, no such finding was made. See 18 U.S.C. § 3143(a)(2)(B).

accordance with this order and judgment. The motion for stay pending appeal is denied as moot.

Entered for the Court

PER CURIAM.